IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 819

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, PETITIONER,

vs.

KOPPERS COAL COMPANY.

On Writ of Certiorari to the Court of Appeal of the Parish of Orleans of the State of Louisiana.

BRIEF FOR RESPONDENT.

NICHOLAS E. MONTGOMERY,
Attorney for Respondent.

April, 1924.

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JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE UNITED STATES, PETITIONER,

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CORONA COAL COMPANY.

On Writ of Certiorari to the Court of Appeal of the Parish of Orleans of the State of Louisiana.

BRIEF FOR APPELLEE.

This is a suit for only $201.83. The proportionate expense of these appeals, possible only to the Government,

and the fact that to have a lawyer argue this case in the Supreme Court of the United States would cause the Corona Coal Company to lose a sum of money greater than the claim if the suit be won, force the defendant and appellee to submit this matter on brief.

STATEMENT OF THE CASE.

This action is for damages claimed to have been caused the wharf, owned and used by the Morgan's Louisiana and Texas Railroad and Steamship Company at the time when said railroad was under the control of the United States Government, acting through the Director General of Railroads, by the tugboat of the defendant. The claimed collision causing the damages was on January 9, **1920,** but suit was not brought until March 3, **1923**—over three (3) years after the damages are claimed to have arisen. Under the law of Louisiana claims of this kind must be sued on within one (1) year, otherwise they are prescribed. Prescription was pleaded in this case and was sustained by the lower Court and by the Court of Appeal and by the Supreme Court.

If this plea of prescription is not maintained then it means that the Government, **engaged in business,** can 5, 8, 10 or 20 years after a claimed act of negligence, when witnesses are all scattered or dead, file suit for recovery—a most unfair, unjust and reprehensible act and contention. It is to be remembered that this suit is brought in the Courts of Louisiana and its Courts are not bound to follow any rules or decisions peculiar to the Courts of the United

States. And it is to be remembered that this cause of action has not arisen out of governmental functions, but out of the running of the railroads **temporarily** as a business.

REASONS FOR JUDGMENT OF THE FIRST CITY COURT, PARISH OF ORLEANS.

"It is argued that this is a suit by the United States Government on a claim due the Government and that, therefore, no prescription applies; that if any prescription be applicable it is prescription allowed by Federal Statute, and not the prescription provided by State law.

"By Sec. 10 of the Federal Control Act it is enacted: 'That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"Section 424 of the Transportation Act contains this language: 'All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.'

(Fol. 24.) "It is evident from the language of this section of the Statutes that the Federal Government

waived the imprescriptibility now asserted. Contention is made that as the Federal Government or its representative, the Director General, is not mentioned in the prescription provisions of the section cited from the Transportation Act, the Federal Government or its representative, the Director General, is not bound thereby.

"The comprehensive significance of the word 'carrier' as recognized by the United States Supreme Court in the case of Missouri Pac. R. R. Co., et al., v. Ault, 256 U. S., pp. 554, *et seq.*, attaches to the word 'carriers' as used in the section cited from Transportation Act. The plea of imprescriptibility is inapplicable.

"The remaining question is, which prescription, Federal or State, is to control. The power granted to Congress by the Federal Constitution to regulate commerce among the several States, is not a power to regulate the Courts of the several States; Congress may give its directions to Courts of its own creation, but when the Federal Government, through its representatives, voluntarily invokes the aid of the State Court, the State law, as to prescription, prevails.

"The exception that the claim herein is prescribed by the State Statute should be maintained." (Tr., pp. 14, 15.)

OPINION OF THE COURT OF APPEAL, PARISH OF ORLEANS.

"It is argued by counsel for plaintiff (1) that a suit by the Director General for the recovery of moneys derived from Federal control is an action by the United States suing in its sovereign capacity; (2) that unless the United States, through the Congress, consents to a statute of limitation, it is not affected by such a

statute; (3) that the United States has not in this instance given such consent. It is finally contended, in the alternative, that even if such consent had been given that the Act 223 of 1914 is not controlling as against the United States, and that if the Government is amenable to any statute of limitation of actions of this nature, it is only subject to the provisions of Section 424 of the Transportation Act of 1920 (41 Stat. L., 492), restricting the time in which suit may be filed to three years, and not two years, as provided under the State statute. The Federal statutes, Sec. 424, is an amendment to the Interstate Commerce Act, and reads in part as follows:

"'* * * all actions at law by carriers subject to this Act for recovery of freight charges, or any part thereof, shall be begun within three years from the time the cause of action accrued, and not after.'

"It is not disputed, nor is there room for doubt, under the ruling in Northern Pacific Railroad Co. v. North Dakota, Ex Rel. Langer (250 U. S., 135), that a suit by the Director General for the recovery of moneys derived from the Federal control is an action by the United States in its sovereign capacity.

"All other points of contention raised by the plaintiff are resolved into the dominant question whether the Federal Government when choosing the State, rather than the Federal Court, in which to litigate its rights, is amenable to State statute, barring only the remedy and (fol. 29) not destroying the cause or right of action. See the case of Pearl Wight v. Zemurray, No. 8057, Orleans Appeal, rendered November 14, 1921, Campbell v. City of Haverhill, 155 U. S., 610—Angell on Limitations, 6th Ed., pp. 56, *et seq.*

"It is manifestly unsound for plaintiff to contend, as was recently held in Davis v. Dupont De Nemours

(287 Fed., 522), that the Federal Government, in exercising its sovereign power under the Transportation Act, has not clearly given its consent to be included or treated as within the statutes of limitation of action applicable to other litigants. The language of Sec. 424 of the Act (41 Stat. L., 492), as above quoted, in our opinion, completely destroys such contention, we are unable to subscribe to the conclusions found in Davis v. Dupont, especially in the light of the broad meaning given to the term 'carriers' as expounded in Missouri Pac. R. R. Co., et al., v. Ault (256 U. S., 554), and cited in the reasons for judgment of the learned Judge from whose Court this appeal is taken. It is an inevitable conclusion that an action of this nature if brought in the Federal Courts would involve estoppel against the Government's denial, even in its most sovereign aspect, of intention, under Sec. 424 to be amenable to the limitations of action therein expressly provided. Were the present litigants before the Federal Court in this matter, it might be properly contended, under highest Federal authority, that there is no bar to the action brought within three years and that the State statute (Act 223 of 1914) is suspended by the Federal Act, and hence altogether unavailable as a defense to the defendant in this case if before the Federal Tribunal.

"In the case of United States v. Hoar, 2 Maaon (Cir. Ct.), 312, where an administrator of an estate pleaded the statute of limitation of Massachusetts in bar of an action in assumpsit brought by the United States for money had and received, the Court, through Justice Story, held the plea not good as against the Government when urged in the (fol. 30) Federal Court. It was there said:

" 'The only point, which has been argued here, is whether the United States are barred of their suit by

the statutes of limitation of Massachusetts above pleaded. It has not been denied, and indeed is too plain for argument, that the statutes of limitation of Massachusetts cannot *proprio vigore* bind or bar the statutes of the National Government. If such an effect can only be by reason of some extension of time for this purpose by the National Legislature.'

"In Ches. & Del. Canal Co. v. U. S. (250 U. S., 123), Mr. Justice Clark stated the rule to be:

" 'That the United States is not bound by State statutes of limitation is settled with equal definiteness in U. S. v. N. C. & St. L. Ry. Co., 118 U. S., 120; U. S. v. Whited & Wheles, 246 U. S., 552, 561.'

"Although by the foregoing and like authorities we find this doctrine plead with almost perfect uniformity, it should be noted that the rule announced only in its application to Federal suits in Federal Courts. We feel justified in holding that this rule cannot bind the State Courts where the *lex fori* prevails and should prevail, particularly against a litigant having a choice of forms, and where the plea of prescription in whatever form it may be urged, affects only the remedy and not the right of the litigants. (25 Cyc., 1008, also 1018.)

"We are entirely in accord with defendant's contention that the Congress clearly intended to subject the Government while in control of common carriers under this emergency litigation, to State laws and liabilities not inconsistent with Federal control. This is too plainly set out in the Federal Control Act (40 Stat. L., 451) to require judicial interpretation. Section 10 of that Act reads as follows:

" 'By Sec. 10 of the Federal Control Act it is enacted: That carriers, while under the Federal control, shall be subject to all laws and liabilities as common

carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or (fol. 31) suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"The last clause of the foregoing section taken with that which precedes it, clearly pronounces against such argument as is herein advanced to the effect that the carrier is an instrumentality or agency of the Federal Government, against which statutes of limitation, particularly those of the State, shall not apply.

"Sec. 206 of the Transportation Act provides for limitations of actions brought against carriers on citation of an agent designated by the President, and that the period of limitation prescribed by either State or Federal statutes (not exceeding, however, two years from the date of passage of the Act) may be brought in any Court which but for Federal control would have ordinarily had jurisdiction. A like provision under Sec. 424 is made for all actions at law by carriers within prescriptive period of three years from the time the action accrues. These two sections, therefore, plainly evidence the intention of Congress that the Federal Government while representing all carriers, within the purview of the Transportation Act, is to be protected while defending timely action, or barred while prosecuting untimely actions, in State and Fed-

eral Courts arising from and after the termination of Federal control.

"We find no merit in plaintiff's contention that Sec. 10 of the Federal Control Act was expressly repealed by the Transportation Act of March 1, 1920 (41 Stat. L., 456). While Sec. 200 (a) of the latter Act provides that Federal control shall terminate at 10:01 A. M., March 1, 1920, it is also stipulated in Sec. 202 of the same Act (fol. 32): 'The President shall, as soon as practicable, adjust, settle, liquidate and wind up * * * all questions and disputes of whatever nature arising out of or incidental to Federal control.'

"To charge the President or his appointed agent with the duty of liquidating all matters arising from Federal control and to provide at the same time that, in the subsequent prosecution of this duty, the Government, its President or agent, shall be given greater rights or remedies than those existing during the Federal control, would be a denial of rights expressly reserved to all parties within the purview of the previous Act.

"We find no error in the judgment of the trial Court, and same is, therefore, affirmed at plaintiff's costs in both Courts."

This judgment, pages 17, 18, 19, 20 and 21 of the transcript, was found correct by the Supreme Court of Louisiana, transcript 23.

I.

In Louisiana the Forum governs prescription even on judgment of another State. *4 La. An., 235, Brown v. Stone; 7 La. An., 272, Taylor v. Hadden.*

II.

The Supreme Court of Louisiana has found no distinction as to prescription for torts between public ministerial officers and private individuals, saying:

> "Applying this test to the plaintiff's petition, it is apparent that the alleged responsibility of the State Treasurer is for an offense or quasi-offense, and that the damages resulting therefrom are necessarily *ex delicto*, and the action, therefore, is prescribed in one year. Civil Code, Art. 3501, new No. 3536. It must be observed that Dubclet was to receive only money—to be raised by taxation, says the Act—and he did not receive money, but bonds, and his act was, therefore, unlawful, and the rule applies to ministerial officers as well as to individuals. This Court said in Semple v. Buhlet, 6 Mart. (N. S.), 665, the law makes no distinction in this respect between public ministerial officers and private individuals, and we ought not to distinguish and, were we at liberty to do so, it would be difficult to find any good reason for imposing a heavier responsibility on a public than a private agent. And this was reiterated in Edwards v. Turner, 6 Rob., 382; Emmerling v. Graham, 14 An., 389; Taylor v. Graham, 15 An., 418. **31 La., 567, Suit of New Orleans v. Southern Bank.**"

III.

Where a Government goes into business in concert or in competition with her citizens, or **where the mischiefs to be remedied** are of such a nature that the State must be necessarily included, the statutes of limitations do run against said Government.

"Limitations do not, as a general rule, run against the sovereign of Governor, whether State or Federal, but the rule is otherwise whether the mischiefs to be remedied are of such a nature that the State must necessarily be included, or whether the State goes into business in concert or in competition with her citizens. 25 Cyc., 1008; 45 Ark., 81, Calloway v. Cossart, 13 Wall., 92, Gibson v. Chuteau.

"It is obvious that all these were plain business transactions after the grant of the original franchises. The attitude of the State with regard to this property, or her rights of indemnity in it, was just such as might have been assumed by any individual or private corporation, which might have chosen to lend its credit to the bank. When a State steps down into the arena of common business in concert, or in competition with her citizens, she goes divested of her sovereignty. The reason of the maxim, '*Nullum tempus occurrit regi*,' no longer applies. U. S. Bank v. McKenzie, 2 Brook (C. J. Marshall's Dec.), 393; U. S. v. White, 2 Hill, N. Y., 59; Fields v. Wheatly, 1 Sneed, 351; Bank of Tenn. v. Dibrell, 3 Sneed, 379; Bank of U. S. v. Planters' Bank of Ga., 9 Wheaton, 904; Angell on Lim., 6 Ed., Sec. 41." *45 Ark. Rep., 88, Calloway v. Cossart.*

IV.

The very law itself, providing for the taking over of the railroads temporarily by the Government, undoubtedly intended the railroads to run as private business and that the Government should not take advantage of its position as a Government to advantage it in its running of the railroads in dealings with individuals. And in this case the defendant was engaged in the business of the railroad—

that is in landing and removing steamships to load or deliver railroad freight at its own wharf. This railroad is what is known as the Southern Pacific. This branch is called the Morgan's Louisiana and Texas Railroad & **Steamship** Company.

The Act of August 29, 1918, Ch. 418, Section 10, reported in the Federal Statutes Annotated, Supplement, 1918, p. 746, provides:

(1) That carriers, while under Federal control, are subject to all laws and **liabilities** as common carriers—except (and this is the only exception) inconsistent with this Act or any other Act applicable to such Federal control or with order of the President. This is the only exception, and there is no law or order to the contrary.

(2) That actions at law and suits in equity may be brought **by** and **against** such carriers, and judgments rendered as now provided by **law.**

(3) That in any action at law or suit in equity against the carrier "no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

This certainly means that the Government is to be in the place of the private owner of the railroad and subject to all existing laws governing the business relations of the railroads and subject to the same suits and judgments. And it means that in all actions for or against the carrier—

the carrier cannot use the defense that it is an instrumentality or agency of the Government, and this would cover the defense to a plea of prescription. The Government, in taking over the railroads, intended that they should be governed by the laws exactly as when run by private individuals, and it was not intended that the people dealing with the railroads should in one particular alone—and that a most unfair and unjust particular—be met with the defense that the railroad is an agency of the Government in the case of a plea of prescription. It seems to me that the injustice and damage done to people doing business with the railroads is such that prescription or the statute of limitation must of necessity run in their favor and that this necessity was considered when in the statute it expressly stated that all existing laws and actions were to govern and that no defense that the carrier was a Government agency or instrumentality was to be or could be made. If this reasonable right and protection is to be read out of the law in order to give the Government now the unjust right to bring suits for damages whenever they please, then in so doing one would seem to suggest that the Government was following what Aristotle held to be the tendencies in constitutional development through wisdom and wealth, thence to numbers and thence to tyranny.

Matters of taxation, matters essentially governmental have no bearing on this case. This is a suit covering a business proposition and so, when the law is as specific as it is, to hold that in cases of this kind the Government could plead that the railroad administration was an in-

strumentality or agency of the Federal Government would be to read into the law an iniquity which the lawmakers never intended.

V.

As stated by Judge Renshaw:

> "The remaining question is, which prescription, Federal or State, is to control. The power granted to Congress by the Federal Constitution to regulate commerce among the several States is not a power to regulate the Courts of the several States; Congress may give its directions to Courts of its own creation, but when the Federal Government, through its representatives, voluntarily invokes the aid of the State Court, the State law, as to prescription, prevails." (Tr., 15.)

We respectfully ask that the judgment of the three Courts of the State of Louisiana be held correct, and that this writ of *certiorari* be dismissed.

Respectfully submitted,

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